(G-62)

IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

RESPONSE OF JOHN J. GHEZZI AND ARTHUR LEVITT TO APPELLANTS' JURISDICTIONAL STATEMENT

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RESPONSE OF JOHN J. GHEZZI AND ARTHUR LEVITT TO APPELLANTS' JURISDICTIONAL STATEMENT

Preliminary Statement

On February 17, 1976 an appeal was docketed in this Court (Docket No. 75-1157) from a judgment of a statutory three-judge District Court sitting for the Western

District of New York. That judgment, in *Citizens for Community Action at the Local Level, Inc., et al.* v. *John J. Ghezzi, etc., et al.*, Civ-1973-222 amended and reinstated its previous judgment in the same case entered January 19, 1975. 361 F. Supp. 1 (W.D.N.Y. 1974).

The action commenced against the Clerk of the Niagara County Legislature and the Niagara County Clerk as well as the Secretary of State of the State of New York and the Comptroller of the State of New York, sought a declaration that the portions of the New York State Constitution and statutory provisions governing the procedure for the adoption of a new charter for county government were in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. That procedure requires a majority of the total votes cast in both the area of the county outside of cities and in the area of the cities of the county. In brief, the violation sought to be declared was that the fundamental right of equal suffrage guaranteed by the Equal Protection Clause or "one man—one vote" had been violated.

The January 1975 judgment declared unconstitutional Article IX, § 1(h)(1) of the Constitution of the State of New York and section 33(7) of the Municipal Home Rule Law. Additionally, injunctive relief was granted by the District Court requiring the filing and implementation of the Niagara County Charter which was passed by a majority of the voters in a referendum held November 7, 1972.

Appellants appealed that judgment (Docket No. 74-1390), and asked this Court to vacate the judgment on the grounds of mootness. The 1972 Charter ordered implemented by the District Court had been supplanted by a Charter passed by a majority of the Niagara County voters in November of 1974.

Appellants argued that the subject matter of the January judgment was the 1972 Charter; since that Charter was never implemented and was now a nullity, the judgment of the District Court was moot.

This Court, by order entered October 6, 1975 in Case No. 74-1390 vacated the January 1975 judgment of the District Court and remanded the cause for reconsideration in light of the provisions of the new Charter adopted by Niagara County in 1974.

The District Court rejected appellants' mootness arguments, amended its judgment to hold that the 1974 Charter

> "be in full force and effect as the instrument defining the form of local government for Niagara County . . ."

and reinstated its prior (January) judgment.

Since January of 1976, when the Niagara County Charter became operative, the County has been functioning pursuant to that Charter.

A County Executive has been elected as have other County officials and all are presently discharging the duties of their offices as prescribed by the Charter. Niagara County has incurred debts, pledged its credit, contracted for services, embarked upon public works, and continues to proceed with its business pursuant to its Charter form of government.

The New York State defendants, John J. Ghezzi, Secretary of State (at the time the suits were filed), and Arthur Levitt, Comptroller, did not appeal from the January judgment nor do they appeal from the December judgment.

However, by letter dated April 28, 1976, the Clerk of the Court conveyed the Court's request for the New York State defendants' response to the appeal.

This response is submitted pursuant to that request.

In response to appellants' Jurisdictional Statement, appellees Whitney E. Barnum, Clerk of the Niagara County Legislature, and Raymond A. Beiter, County Clerk of the County of Niagara have moved this Court for an order affirming the judgment of the District Court. Appellees Citizens for Community Action and Francis W. Shedd have similarly moved.

Questions Presented

Appellants' Jurisdictional Statement in Docket No. 74-1390 (referred to by appellants as their "original Jurisdictional Statement") set forth the essential question on their appeal. That Question is adopted by reference in their Second Jurisdictional Statement (Docket No. 75-1157) p. 5. It is the question before this Court in this case, *viz.*:

> "The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved in referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county."
>
> "Do these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?"

Constitutional and Statutory Provisions Involved

Constitution of the United States—Amendment XI:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

New York State Constitution, Article IX, § 1, subdivision (h)(1):

> "Counties * * * shall be empowered by general law * * * to adopt * * * alternative forms of county government provided by the legislature * * *. Any such form of government * * * may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment * * * shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities, and in the cities of the county, if any, considered as one unit."

Municipal Home Rule Law, § 33, subdivision 7(b):

> "* * * If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit * * *".

ARGUMENT

The creation of separate voting units and the requirement of a double referendum in Article IX, § 1 (h) (1) of the New York State Constitution and Section 33(7) of the New York Municipal Home Rule Law is a valid exercise of the State's sovereign powers and not in violation of the fundamental right of equal suffrage guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

The sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions is well recognized. *Trenton* v. *New Jersey,* 262 U.S. 182 (1923). *Hunter* v. *Pittsburgh,* 207 U.S. 161 (1907) and *Williams* v. *Eggleston,* 170 U.S. 304 (1898). That right and authority extends to the establishment, modification or abolition of local government units and structures. As the Court unanimously observed in *Gormillion* v. *Lightfoot,* 364 U.S. 339 (1960), the creation by the State of its municipalities is "clearly a political act."

The court below seeks to enlarge and extend the "one man, one vote" rule of *Baker* v. *Carr,* 369 U.S. 186 (1962) and *Reynolds* v. *Sims,* 377 U.S. 533 (1964) to inhibit the establishment of a state's subordinate governmental units. The principle of "one man, one vote" is not without limits. It has been invoked in only the election of governmental representatives with the exception of two cases relating to the approval of general obligation bonds. *City of Phoenix, Arizona* v. *Kolodziejski,* 399 U.S. 204 (1969), and to the approval of revenue bonds, *Cipriano* v. *City of Hooma,* 395 U.S. 701 (1968).

In both *Phoenix* and *Cipriano,* the Court was offended because non-property owners were disenfranchised from voting in elections relating to the approval of bonds. In each case the Court found that elected representatives were pledging the credit of a larger number of people than those entitled to vote in the referendum. Both cases involved the derrogation of otherwise qualified voters in that they were being taxed without being equally represented.

The issue here presented to the electorate in the referendums complained of was not that of representation but that of form of government. The interest of the separate geographic locations was properly taken into account by the state in the exercise of its sovereign powers to form units of local government. In *Saylor* v. Tulare *Lake Basin Water Storage District,* 410 U.S. 719 (1973) the Court held that there are times when the voting for representatives affects a certain group more than others so that limiting the franchise to those who are specially affected is not violative of the Equal Protection Clause of the Fourteenth Amendment. In the case of *Gordon* v. *Lance,* 403 U.S. 1 (1971) this Court held that a West Virginia statute requiring a 60 per cent affirmative vote upon a proposition to incur debt was constitutional. Chief Justice Burger, after citing *Gray* v. *Sanders,* 372 U.S. 368 (1962) and *Cipriano, supra,* as not being controlling and emphasizing the issue being voted on, stated:

> "Although West Virginia has not denied any group access to the ballot, it has made more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our History, or our cases that require that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection

of a Governor by a State Legislature, after no candidate received a majority of the popular vote." [91 S. Ct. at page 1892].

The court below acknowledged the sovereign right of a state in the creation and structuring of subordinate government instrumentalities insulated from federal judicial review, but then found a "federally protected right" which was being damaged by state power. No "federally protected right" exists here for the participation on an equal basis in the election of representatives so it must be a right to participate in the determination of powers to be exercised by local governments. This is contrary to the Court's holding in the *Reynolds* v. *Sims, supra,* case and *Sailors* v. *Board of Education*, 387 U.S. 105 (1967) in that no such constitutional right exists. No "unlawful end" is being accomplished by the New York State Constitution or its Home Rule Law. The only end here is the establishment, modification or abolition of subordinate local government which is a legal end and the state concededly has full and complete power to do so.

The state procedure which operates to require more than a mere majority approval to effect change in the form of County Government falls within the thrust of the *Gordon* v. *Lance, supra,* decision. This method recognizes the differing needs of localities and that they are sometimes served best by the exercise of governmental power by small political units which are closer to the people and therefore more responsive to their needs. The procedure permits the state's sovereign rights to be exercised so that neither city dwellers' nor town dwellers' rights with respect to their own form of government can be overridden without mutual consent. *Saylor* v. *Tulare Lake Basin Water Storage District, supra.*

The *Cipriano* case and *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969) both stand for the

proposition that in certain circumstances varied voting procedures may be "necessary to promote a compelling state interest." See also, *Wells* v. *Edwards,* 409 U.S. 1092 (1973).

The procedure adopted by the people of New York State recognizes that there are important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government, which encompasses both Cities and Towns could be replaced or modified, a majority of the voters in the Towns approve, and a majority of the voters in the Cities approve. This is a reasonable and responsible exercise of the state's sovereign right to determine its own form of government.

CONCLUSION

The Court should take jurisdiction to determine the constitutional issue involved by this case.

Dated: May 14, 1976.

Respectfully submitted,

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